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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MODERN TRASHMOVAL, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered in the above consolidated cases on September 23, 1963, rehearing denied December 18, 1963.

OPINIONS BELOW

The opinion of the district court (J.A. 16-37)[1] is reported at 207 F. Supp. 596. The opinion of the court of appeals (App. 1a–36a) is reported at 323 F. 2d 451.

[1] Citations designated "J.A." are to pages of the Joint Appendix comprising the printed record in the court of appeals. "App." refers to the appendix to this petition.

JURISDICTION

The judgments of the court of appeals were entered on September 23, 1963 (App. 37a–38a). A timely petition for rehearing en banc was denied on December 18, 1963 (App. 39a). By order of the Chief Justice, dated March 17, 1964, the time for filing a petition for certiorari was extended to March 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent is a Baltimore refuse removal contractor whose customers are virtually all business and industrial establishments, many of which are engaged in interstate commerce or in the production of goods for interstate commerce. The employees involved are the truck drivers and their helpers engaged in collecting and removing the waste materials from the customers' premises. The questions presented are:

1. Whether employees who are engaged regularly and recurrently in the collection and removal of industrial waste, rubbish and debris from establishments engaged in interstate commerce or in the production of goods for interstate commerce, as well as from other business establishments, are covered by the Fair Labor Standards Act.

2. Whether the business of removing waste, rubbish and debris from industrial and commercial establishments is a "retail or service establishment" eligible to claim exemption under Section 13(a)(2) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Fair Labor Standards Act Amendments of 1949, 63

Stat. 910, and by the Act of May 5, 1961, 75 Stat. 65 (29 U.S.C. 201, *et seq.*), are as follows:

SEC. 3. As used in this Act—

* * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * * *

(j) "Produced" means produced, manufactured, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * * *

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *.

STATEMENT

This case involves three consolidated actions brought by the Secretary of Labor under the Fair Labor Standards Act—one seeking an injunction under § 17 of the Act to restrain further violations of the wage and record-keeping requirements; and the other two instituted under § 16(c) to recover unpaid compensation claimed to be due to 19 employees (J.A. 16). The court of appeals, reversing the district court, held (1) that the employees were not within the coverage of the Act and (2) that, in any event, the respondent was exempt from the Act as a "retail or service establishment."

1. Respondent is a corporation engaged in the collection and disposal of garbage, rubbish, debris, and other industrial waste in Baltimore, Maryland. The employees in question are truck drivers and helpers engaged in collecting refuse from containers at customers' premises and transporting it to dumping grounds or incinerators (J.A. 130, 137a). Typically, they work 9 to 10 hours a day six days a week (J.A. 97-98, 103, 113).

With minor exceptions, all of respondent's customers are businesses, and respondent's president conceded that 10 or 15% were "industrial or manufacturing firms" (J.A. 137). Company officials testified as to the interstate character of several of respondent's largest customers: Food Fair, which is engaged in handling huge quantities of goods coming daily from out of the state and being shipped every day to its retail outlets in Virginia, Delaware, Maryland, and Pennsylvania (J.A. 209); Ward Baking Company, manufacturer of bread and cake shipped to North Carolina, Virginia, Delaware, Pennsylvania and the District of Columbia (J.A. 211–212); McCormick Co., manufacturer of spices, drugs and extract, shipped "[a]ll over the United States and quite a few foreign countries" (J.A. 217); International Harvester Company, a wholesale distribution center, shipping daily out-of-state in the territory encompassing Pennsylvania, Delaware, North and South Carolina, Virginia, and Washington, D.C. (J.A. 222, 225); and Pittsburgh Plate Glass Company, a warehouse regularly receiving goods from out-of-state (J.A. 203). Food Fair, at which 96 stops were made during a single representative month at the warehouse alone, was respondent's largest single customer, accounting for 20% of its total billings; during the same month 94 stops were made at International Harvester.[2]

[2] Resp. Exh. 4 (unprinted). That exhibit shows all stops and billings for the month of September 1961 and was introduced by respondent, in support of its claim to exemption, as being representative of the period involved here. Respondent was permitted to withdraw the original exhibit to keep the information from competitors, but a photostatic copy will be furnished the Court on request.

In the course of the trial it was stipulated that "each of the 19 employees * * * during the entire period of employment served at least one customer in each week who was engaged in the production of goods for commerce" (J.A. 197). The stipulation was made on the express condition that the government would not call as witnesses or inquire of any more officials of respondent's customers as to the nature of their businesses. (J.A. 198.) As a consequence, although the Secretary had previously listed 31 admitted customers of respondent (J.A. 53–54, 109) which he alleged were engaged in producing for commerce—including such establishments as Armco Steel Corporation, Baltimore Smelting Co., International Harvester Company, Johnson Chemical Industries, Inc., General Ship Repair Co., Inc., Independent Can Co., and Calvert Distilling Co.—no further direct evidence of the character of respondent's customers, or the amount of time spent by the employees in serving such customers, was adduced.

On the relationship of trash collection to production, several witnesses testified that the removal of spillage, spoilage, residue, rejects, containers, wrappings, and other forms of industrial waste was essential to avoid blockage of operations by exhaustion of space, to prevent odors and health and fire hazards forbidden by law, and to maintain commercial standards of production (J.A. 28–30). Summarizing the evidence (J.A. 27–30), the district court concluded that "[t]he direct relationship of the trash removal activities in this case to the production of goods for commerce was clearly demonstrated" (J.A. 27).

2. In support of its claim to the "retail service" exemption under § 13(a)(2), respondent adduced the testimony of its own president Bohager and of the president-owner of Robb Tyler, Inc. (another industrial refuse-removal contractor in Baltimore against whom an injunction action under the Act was then pending)[3] and the depositions of two officials of refuse-removal companies in Atlanta and Chicago (against both of whom actions under the Act are also presently pending).[4] Each of those witnesses expressed the opinion that businesses like respondent's are "retail" services and are so regarded in the trash removal industry (J.A. 31–32). Bohager admitted that his opinion was based on discussions with other trash dealers within the preceding five months (J.A. 337) and thus after the instant actions had been filed. Tyler based his opinion on the belief that "we are a public service that will handle anybody that needs our service, and the price on it, no matter how small or large, is based on the amount of material we take and the time it takes us to take it" (J.A. 318–319). He admitted on cross-examination, that

[3] D. Md. Civil Action No. 13818, filed May 21, 1962 (Robb Tyler testified in the instant case on May 28, 1962). There is also presently pending against Tyler's company a Section 16(c) action (D. Md. Civil Action No. 13922, filed July 3, 1962) on behalf of 29 employees for unpaid wages in the amount of $12,565.37, which amount has been deposited in a trust account pursuant to a stipulation that the disposition of the money shall be determined by the outcome of the instant case.

[4] *Turner* v. *McWhirter Material Handling Co.*, N.D. Ga., Atlanta Div., Civil No. 8480 *et al.*; *Wirtz* v. *Dean Buntrock et al., d/b/a Ace Scavenger Service* (N.D. Ill.), Civil No. 63–C–1472 and Civil No. 63–C–1633.

the trade association had considered the "retail" status of the business only in connection with the exemption from the Fair Labor Standards Act (J.A. 319); that the matter had been discussed only in the last few years (J.A. 314); and that he definitely had a personal interest in the outcome of this case because of its effect on his own business, which is "pretty much in the same category" (J.A. 316).

Respondent's charges are fixed by contract with each customer, and are based on a variety of factors—the volume of trash, the size of the container and the difficulty of reaching and dumping it, the charge for the container if supplied by respondent, and the competition in the particular locality (J.A. 313, 329). On a "per stop" basis (calculated simply by dividing total charges by the number of actual stops), the charges to particular customers varied from $0.25 to $5, according to an estimate by respondent's president (J.A. 137b), and from $0.99 to $40.99, according to an accountant's tabulation introduced by respondent as an exhibit (Exh. 5, J.A. 306–307).[5]

Dr. Richard D. Entenberg, Professor of Marketing and Director of the Retail Research Center of the Graduate School of Business at the University of Pittsburgh, testified that marketing authorities, including himself, classified waste removal as a utility along with "electric, gas and sanitary services," and

[5] The court of appeals' statement that "relatively small amounts of service are rendered at each stop * * * at uniform rates" (App. 32a) thus has no support in, and is contradicted by, the record. The only evidence of a "uniform" rate was the charge of $15 *an hour* for special jobs for other than regular customers (J.A. 188).

that the "utilities" classification is "separate and apart from the classification of retail and wholesale" and "is outside of the province of retail or wholesale sales, as we know them" (J.A. 242–244, 262). The U.S. Commerce Department's Standard Industrial Classification Manual, he pointed out, also includes refuse collection in the category of utilities (J.A. 238–241). The Manual's Major Group 49, "Electric, Gas, and Sanitary Services" includes "Refuse Systems"—defined as "Systems engaged in the collection and disposal of refuse"—in the same major group as gas, electric, water, irrigation, and sewage systems (J.A. 35–36, 241). Interpretative Bulletins issued by the Administrator from 1938 to 1961, introduced in evidence (Exhs. 14 through 18; J.A. 281-284), have consistently classified similar utilities, along with many other industrial services comparable to refuse-removal, as other than "retail" services.

3. The district court found that the "direct relationship of the trash activities in this case to the production of goods was clearly demonstrated by the evidence" (J.A. 27) and that the proofs and stipulations were sufficient to show, both as a fact and as a matter of law, that respondent's employees were engaged in work "closely related" and "directly essential" to the production of goods for commerce within the meaning of § 3(j) of the Act (J.A. 30). The court also rejected respondent's claim to exemption under § 13(a)(2), finding as a fact that respondent had "failed to prove that its business had traditionally, and before 1949, been commonly recognized as retail" and concluding as a matter of law that respondent had

not demonstrated its entitlement to exemption (J.A. 36–37). The court of appeals reversed on both points, holding that the employees were not within the scope of the Act, and also that respondent's business was an exempt "retail or service establishment."

REASONS FOR GRANTING THE WRIT

1. The decision below, holding that respondent's employees were not engaged in the "production of goods for commerce," is in conflict with the First Circuit's decision in *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40. There the court of appeals, reversing the district court's summary judgment in favor of the employer, held that employees of a local trash collector in Boston, regularly engaged in removing rubbish from the premises of (i) concerns producing goods for commerce, as well as of (ii) local commercial firms, and (iii) private dwellings, were employed in a "closely related" occupation "directly essential" to production for commerce. The court below has held that the employees of a trash collector in Baltimore, serving almost entirely commercial and industrial customers, are not engaged in "production of goods for commerce." The conflict is direct and can be resolved only by this Court.

Nor is a factual distinction between the two cases possible. In *Dooley*, although the court attached no particular significance to the fact, it was estimated that certain named employees spent one-fourth to one-third of their time making collections from establishments engaged in commerce or the production of goods for commerce. In the present case, it was stip-

ulated that each employee served at least one interstate customer every week, and there was specific evidence that several of respondent's largest customers, one of which alone accounted for 20% of respondent's aggregate monthly billings, were producers for commerce. It is debatable whether the quantitative showing in *Dooley* or in the present case was greater. But in any event the court below expressly stated that it reached its conclusion on the issue of coverage "without consideration of the quantitative evidence regarding the amount of customer activity which is or was in production for commerce * * *" (App. 22a). It seems clear that neither the First nor the Fourth Circuit viewed the quantitative showing or lack of it as essential to its holding.

The conflict is one of reasoning as well as result. Whereas the court below laid stress upon the fact that the purpose of respondent's business "is to serve a miscellany of users in a limited geographical area" and upon the "generally accepted view of trash removal as a local service" (App. 21a), the First Circuit denied or minimized the significance of these factors. That Dooley Bros. was in "an independent local service industry," and included among its customers local businesses and private homes, was held by the First Circuit not to be determinative, since "it is the nature of the work being done, and not the nature of the employer's business, that is controlling," and since "[s]uch mixed employment has never been held to deprive an employee of coverage" (*Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d at 43–44, citing this Court's decisions in *Mitchell* v. *Lublin, McGaughy &*

Associates, 358 U.S. 207, and *Roland Electrical Co.* v. *Walling*, 326 U.S. 657).[8]

2. The Fourth Circuit's holding that respondent's employees are not protected by the Act runs counter to a long line of decisions by this Court adopting a liberal construction of the Act's coverage and holding it applicable to employees of independent contractors supplying maintenance, custodial and other industrial services to producers of goods for interstate commerce. See, *e.g.*, *Kirschbaum* v. *Walling*, 316 U.S. 517; *Borden Co.* v. *Borella*, 325 U.S. 679; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Armour & Co.* v. *Wantock*, 323 U.S. 126, rehearing denied, 323 U.S. 818; *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945; *Walling* v. *Sondock*, 132 F. 2d 77, certiorari denied, 318 U.S. 772. The removal of waste from industrial establishments is no less "closely related" or "directly essential" to the production of goods for commerce than the services of employees of utility companies supplying gas, electricity, and water to producers of goods for commerce, which have been held to be covered. *Reynolds* v. *Salt River Valley Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light and Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); *Lewis* v. *Florida Power & Light*

[8] It is true, as the court below observed (App. 24a), that the First Circuit did not mention this Court's decision denying coverage in *40 East 40th St. Co.* v. *Callus*, 325 U.S. 578, or discuss "dedication," "the significant factor so recently emphasized by the Supreme Court" in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310. But these omissions merely confirm the divergent legal standards applied by the two courts of appeals and their quite different interpretations of the *Callus* and *Zachry* decisions.

Co., 154 F. 2d 751 (C.A. 5); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6). While all of the foregoing cases (except *Joyce*) antedate the 1949 amendments to § 3(j), their authority remains unimpaired. Each case was cited with approval by the Statement of the majority of the Senate Conferees on the 1949 bill (95 Cong. Rec. 14875), and both that Statement and the Statement of the House Managers (95 Cong. Rec. 14928–29) refer to the employee activities involved in those cases as illustrations of work which remains subject to the Act.

In concluding that the activity of respondent's employees was functionally "remote" from the production process, and lacked "dedication" to production for interstate commerce, the court below misapplied this Court's *Callus* and *Zachry* decisions. Whereas *Callus* dealt with janitorial and maintenance services in an office building far removed from the scene of manufacture, and occupied by a variety of tenants only some of whom were producers for commerce, the present case involves services performed at the very facilities where manufacturing for commerce is carried on. The importance of that distinction was

[1] Nor is it material, as the court of appeals believed, that the employees here did their work "outside" the plant (App. 22a). Analogous services performed by night watchmen or fire guards have uniformly been held covered by the Act, whether performed inside or outside the interstate facility. *Walton* v. *Southern Package Corp.*, 320 U.S. 540 (a night watchman who did not enter the premises); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 127 (fire guards not given access to the factory premises at night except by special permission); *Walling* v. *Sondock*, 132 F. 2d 77, 78 (C.A. 5), certiorari denied, 318 U.S. 772 (night watchmen employed by private detective agencies patrolling various buildings, only a small portion of which were engaged in, or produced for, commerce—see the district court's

emphasized both in *Callus* itself (325 U.S. at 583–584) and in *Zachry* (362 U.S. at 319). And since the work involved here, unlike that in *Callus* and *Zachry*, is directly and immediately related to the production process, there was no justification for the Fourth Circuit's insistence that the employment be "dedicated * * * either exclusively or primarily" to interstate establishments. In *Roland Electrical Co., supra*, this Court held that an electrical contracting company was within the compass of the Act even though it served a general miscellany of private, commercial and industrial customers, only 3.3% of whom (33 out of approximately 1,000) were engaged in commerce or production for commerce (326 U.S. at 661–662). Many, if not most, of the utilities and independent contractors whose employees have been held to be covered by the Act serve a variety of customers, both local and interstate; the work of their

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opinion, 43 F. Supp. 339, 340–341). These decisions, all of which antedate the 1949 amendment to § 3(j), were explicitly approved by the Senate Conferees (95 Cong. Rec. 14875; concurred in by the Statement of the House, but without reference to specific decisions, *id.* at 14929) and remain fully authoritative.

For similar decisions on night watchmen subsequent to the 1949 amendment, see *Russell Co.* v. *McComb*, 187 F. 2d 524 (C.A. 5); *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C.A. 2), certiorari denied, 348 U.S. 823; *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945, affirming *per curiam* the district court's decision that the Act covers guards furnished by an independent detective agency to patrol and guard the premises during night hours (110 F. Supp. 918), and reversing the decision of the court of appeals that the Act is inapplicable to guards who "do not physically handle the goods received or shipped" (211 F. 2d 241, 244 (C.A. 7)).

employees is no more "dedicated" to production for commerce than that of the employees here.

The suggestion of the court below that employees furnishing services to interstate producers, *inter alia*, were not entitled to the Act's protection because the government's proof and stipulation failed to show "substantial contact" by specific employees with particular identified producers is inconsistent with this Court's decision in *Roland, supra,* where a stipulation essentially identical to that in the instant case was held sufficient proof of the employees' coverage.* The standard of proof which the decision below would thus impose upon the Secretary is contrary to that previously adopted by the Fourth Circuit itself as well as by other courts of appeals: that where interstate and intrastate activity are commingled in an employer's operations, it is for the employer, who alone has the facts, to show how the services of particular employees were distributed between the two classes of business. *Guess* v. *Montague,* 140 F. 2d 500, 504 (C.A. 4). Accord: *Mitchell* v. *Owen,* 292 F. 2d 71, 78–79 (C.A. 6); *Hagan* v. *Goldberg,* 291 F. 2d 249, 251 (C.A. 9). Cf. *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687.

* In *Roland*, it was stipulated that "every mechanic of the defendant worked, in practically every workweek, *for some* of the said [33] customers" (326 U.S. at 662, emphasis added). In the instant case, the stipulation was that "each of the 19 employees * * * served *at least one* customer in each week who was engaged in the production of goods for commerce" (emphasis added, J.A. 197, 25–26). Thus, in *Roland*, there was no more proof tying specific employees with specific production for commerce than is contained in the stipulation here, unless the difference between "some" and "at least one" is thought consequential.

3. The alternative holding of the court below—that respondent's waste-removal business is within the "retail" exemption—conflicts in principle not only with the settled doctrine that exemptions from the Act are to be narrowly construed[9] but with the numerous decisions of this and other courts holding analogous industrial service and utility businesses not to be susceptible of classification as "retail": janitorial services for offices and manufacturing plants (*Kirschbaum*, 316 U.S. at 519, 526); gas and electric utility services (see *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295, quoting committee reports expressly excluding such utilities from the exemption's intended scope); guard and detective service to department store warehouses (*Durkin* v. *Joyce Agency*, 110 F. Supp. 918, 921 (N.D. Ill.), affirmed *sub nom. Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945); reporting service to check on the honesty and efficiency of employees in retail shops (*Willmark Service System* v. *Wirtz*, 317 F. 2d 486 (C.A. 8), certiorari denied, 375 U.S. 897; *Goldberg* v. *Sorvas*, 294 F. 2d 841 (C.A. 3)); telephone-answering service (*Telephone Answering Service* v. *Goldberg*, 290 F. 2d 529 (C.A. 1)); and an addressing and mailing service (*Goldberg* v. *Roberts*, 291 F. 2d 532 (C.A. 9)). Like the services involved in most of those cases—and more so than in the case of most "utilities"—respondent's services are regularly provided exclusively to other businesses and not for the ordinary householder, whose garbage disposal

[9] *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295.

needs (but for an occasional "special job") are provided for by the municipality. Nor does respondent make numerous independent "sales" of its services in small quantities to casual purchasers; its services are provided on a regular and continuing basis under contract with business customers which require the services on a "daily" basis as a necessary adjunct to the operation of their businesses. The regular and recurrent removal of waste solids by a trash-removal concern is no more a "retail" enterprise than is the regular removal of waste fluids by a sewage facility: neither is susceptible of classification under a wholesale-retail dichotomy and both can for that purpose be properly classified only as "utilities," as they are indeed classified by the Department of Commerce.

Even were waste removal susceptible to classification as "wholesale" or "retail", it would still be necessary under the statute to show that the respondent's sales were "recognized as retail sales or services in the particular industry."[10] Here the district court, carefully noting that "discussions in the industry as to its retail nature were apparently triggered (and the industry reaction perhaps motivated) by recent investigations and suits by the Secretary of Labor" (J.A. 32), and noting further the objective evidence and

[10] It is settled, however, that the question of "industry recognition" does not become material until it has first been concluded that the business is of a type which is susceptible of classification as "retail"—*i.e.*, is the kind of industry which was traditionally regarded, prior to the 1949 amendments, as having a "retail" branch. *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Goldberg* v. *Norvas*, 294 F. 2d 841, 848; *Goldberg* v. *Roberts*, 291 F. 2d 532, 534 (C.A. 9).

expert testimony adduced by the government, found that respondent had failed to carry its burden of proof. The reversal of that finding by the court of appeals amounts to a holding that so long as industry witnesses maintain a solid front, their self-interested characterization of their common activity as "retail" must be given controlling weight, even though that characterization is of recent contrivance and has no significance except for purposes of gaining the exemption. Such a holding not only invades the province of the trial court to appraise the credibility and probative value of the evidence; it disregards the expressed intent of Congress not to permit each industry to act as its own lexicographer.[11] The decision would make it possible for any industry to exempt itself from the Fair Labor Standards Act simply by adopting a deliberate policy of characterizing its activity as "retail." A doctrine of such far-reaching impact in the application of the "retail" exemption should not be allowed to stand without review by this Court.

4. The issues, both of coverage and of exemption, are of broad importance, not only because of their impact upon the thousands of workers employed in the refuse-removal industry and upon the numerous other actions presently pending in district courts against other refuse-removal contractors, but also because of the seriously unsettling implications of the

[11] The sponsors of the amendatory legislation—particularly Senator Holland, the bill's principal sponsor,—"repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption." *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190, 193 (C.A. 1); 95 Cong. Rec. 12510.

decision below for employees in a wide variety of other industrial service industries.

Directly and immediately the issues will determine the applicability of the Act to some 34,500 workers employed as operators and laborers by refuse-removal and sanitation companies throughout the nation (U.S. Census of Population 1960, Occupation by Industry, Final Report P.C. (2) 7C, p. 86). Information obtained from the Labor Department's field offices shows that there are an estimated 3,000 to 4,000 employees of refuse-removal firms within the jurisdiction of the Fourth Circuit alone. The nationwide refuse-removal industry involves total annual charges of approximately $1.3 billion. See 1963 Sanitation Industry Yearbook (published by Refuse Removal Journal), p. 9.

The enforcement problems created by the decision below are both serious and pressing. Suits are now pending against 33 refuse-removal employers, and investigations of 17 other such employers have been completed.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

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Solicitor,

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Department of Labor.

MARCH 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8828

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,
Appellee,

versus

MODERN TRASHMOVAL, INC., a corporation,
Appellant.

No. 8829

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,
Appellee and Cross-Appellant,

versus

MODERN TRASHMOVAL, INC., a corporation,
Appellant and Cross-Appellee.

No. 8830

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,
Appellee and Cross-Appellant,

versus

MODERN TRASHMOVAL, INC., a corporation,
Appellant and Cross-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
R. DORSEY WATKINS, DISTRICT JUDGE.

(Argued June 7, 1963. Decided September 23, 1963.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and LEWIS, District Judge.

BOREMAN, Circuit Judge:

I.

FACTUAL BACKGROUND

(a) *Court Proceedings.*

These appeals involve three actions brought in the

United States District Court for the District of Maryland by the Secretary of Labor under the Fair Labor Standards Act,[1] herein called the Act. In case No. 8828 the Secretary sought an injunction against violations of the wage and record-keeping requirements of the Act by Modern Trashmoval, Inc. (herein referred to as defendant or Modern) and Francis P. E. Bohager, its president.[2] In cases Nos. 8829 and 8830 the Secretary sought to recover from Modern unpaid compensation alleged to be due under the Act[3] to nineteen of Modern's employees for work performed between April 1, 1959, and March 29, 1961. Because identical issues of coverage under the Act were involved, the three suits were consolidated for trial.

The District Court[4] held that the nineteen use-plaintiffs were covered by the Act because engaged in work "closely

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[1] 29 U.S.C.A. § 201, *et seq.*; 52 Stat. 1060 (1938), as amended by 63 Stat. 910 (1949) and 64 Stat. 1263 (1950). The Fair Labor Standards Amendments of 1961 (75 Stat. 65) do not apply to this case.

[2] The injunctive suit was brought under 29 U.S.C.A. § 217; 52 Stat. 1069 (1938), as last amended by 75 Stat. 74 (1961).

[3] The two wage suits were brought under 29 U.S.C.A. § 216(c) which states in pertinent part:

"(c) * * * When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or section 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim. *Provided*, That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled." 63 Stat. 919 (1949); 64 Stat. 1263 (1950).

[4] The opinion of the District Court, reported at 207 F. Supp. 596 (D. Md. 1962), sub nom. Goldberg v. Modern Trashmoval, Inc., should be read in conjunction with this opinion.

related" and "directly essential" to the production of goods for commerce; that Modern was not exempt as a "retail or service establishment" under section 13(a)(2) of the Act;[5] and that Modern, although in violation of the Act, had acted in good faith on the advice of counsel. The court declined to issue the requested injunction and dismissed that suit, but it rendered judgments for the plaintiffs in the two wage suits. Modern appeals from the judgments adverse to it in the wage suits, and also appeals from the ruling, common to all three actions, that the activities of its employees were subject to the provisions of the Act. The Secretary of Labor cross-appeals from the judgments in the wage suits on the ground that the District Court erred in not allowing interest on the wages withheld.[6]

(b) *Description of Modern's Business and the Activities of its Employees.*

Defendant Modern is a Maryland corporation engaged exclusively in the collection and disposal of garbage, rubbish, debris and industrial waste in the City of Baltimore and its environs. With the exception of a small amount of cardboard resold during the period covered by the proof (April 1, 1959, through March 29, 1961) and later to be mentioned, the material collected is and was either destroyed by incineration or dumped within the State of Maryland. At the times in question, Modern's employment totaled approximately thirty-two persons of whom twenty-four were drivers and helpers. The nineteen use-plaintiffs

[5] 29 U.S.C.A. § 213(a)(2), see footnote 11, infra.

[6] Francis P. E. Bélanger, president of Modern, is not subject to the judgments for back wages and, therefore, has not appealed. The Secretary of Labor did not appeal from the dismissal of the injunction suit.

here were among approximately fifty who worked as drivers and helpers during the two-year period for which compensation was sought. Drivers and helpers proceed in Modern's trucks to the locations on customers' premises where trash has been accumulated in containers by the customers, empty the containers or load them full onto the truck, and then haul the unsorted trash and garbage to an incinerator or dump for final destruction or burial. No labor skills are needed for this work other than the requirement that each driver be able to operate his truck and remember his route.

Three alternative types of service are provided by Modern depending primarily upon the volume of trash to be collected. At so-called "container stops," Modern furnishes containers two to six cubic yards in size and collects the accumulated trash, using a specially designed truck known as a Dumpmaster which, by mechanical means, lifts each container, dumps its contents into the truck, compacts the trash in the truck and replaces the empty container on the customer's premises, taking approximately two to three minutes' time per container. Normally, the Dumpmaster is operated by a driver without a helper. At "hand stops" a driver and his helper manually carry and dump standard garbage cans, usually owned by the customer. The time required for a "hand stop" can vary from two minutes up to forty minutes with the average time estimated at twenty minutes. The third type of service, termed "miscellaneous," is devoted to answering special calls from regular customers and calls from one-time customers. The "container stops" and "hand stops" are served at regular intervals from once a week to twice a day by drivers and helpers assigned to regular routes.

At the trial below uncontradicted evidence showed that trash-collection service is available to anyone in Baltimore and vicinity upon calling Modern's office. However, most of Modern's business consists of regular route collections from commercial establishments, some of which are engaged in producing goods for interstate commerce. One of Modern's witnesses estimated that not over 10% to 15% of its customers were industrial or manufacturing firms. No special discounts are given to particular classes of customers, and charges to all customers are based on the time required to collect trash at that location, the volume of trash handled and competition in the area. Modern's drivers and helpers are not in any way concerned with the business or productive activities of customers. Drivers merely need to know the location of the customer's collection point and how frequently to stop there. Because the price of Modern's service is in part dependent upon time, most trash containers are so located as to provide convenient access for trucks and to facilitate rapid collection. To maintain a more attractive appearance, a relatively small number of customers place containers in an inclosure and require the trash collectors to summon assistance before entering. Some large containers owned by Modern are mounted on wheels and moved about the premises while the customer loads them with trash, but Modern's employees do not enter the customer's premises to pick up scattered trash in general collections. The sole exception is certain "miscellaneous" calls in which Modern's employees are required to clear debris after a fire or to clean up a particular littered area.

Modern placed in evidence a charted analysis of its service stops and charges for the month of September 1961, the month in which suit was brought. The chart

showed that in September 1961 Modern's trucks made a total of 20,112 stops representing total sales of $52,841.13. Of the total number of stops, 38.41% were for charges of less than $1.00 per stop; 77.13% were for less than $4.00 per stop; only 3.45% were for charges of $10.00 or more per stop. The chart also showed that 66.50% of Modern's total sales for the month were made at prices of less than $6.00 per stop.

(c) *Evidence Relating the Occupations of the Use-Plaintiffs to Interstate Commerce.*

In an effort to obtain proof that the use-plaintiffs were engaged in work having sufficient relationship to interstate commerce to bring them within the coverage of the Act, the Secretary undertook extensive proceedings directed to identifying Modern's customers, their activities in commerce or in producing goods for commerce, and the contacts of the use-plaintiffs with customers having such activities related to interstate commerce. To avoid the inconvenience accompanying the resulting lengthy examination of its personnel and records, Modern agreed to a stipulation that each of the nineteen use-plaintiffs, during each week of his employment by Modern between April 1, 1959, and March 29, 1961, collected trash from at least one customer who was then engaged in the production of goods for commerce. Six witnesses, each employed by a different customer of Modern, testified that cessation of Modern's collection service would cause various inconveniences at their respective production and distribution locations, and several of them suggested that, under certain circumstances, work stoppages could result (see discussion, 207 F. Supp. at 603-604). However, only four of these witnesses stated that shipments were made in interstate

commerce from their places of business, no identification was made of particular use-plaintiffs as the employees serving these customers, and no proof was presented to show that these customers or their shipments in interstate commerce were representative of Modern's customers as a whole. Modern had between 800 and 1,000 customers during the period in question but, except with respect to the above mentioned six customers, there was no proof as to whether their activities affected interstate commerce, or as to the nature and extent of trash collection services rendered to customers in commerce or producing goods for commerce, the possible effects on commerce of interruption of that service, and the employment of the use-plaintiffs in serving such customers. Thus, on this record, the stipulation merely states that, during the period in suit and his employment, each use-plaintiff worked a minimum of two to three minutes per week in collecting trash from an unidentified customer who was engaged in the production of goods for commerce.

(d) *Evidence on the "Cardboard Issue."*

A second and independent area of proof, termed the "cardboard issue" by the parties (as distinguished from the "removal of waste" issue described above), is claimed by the Secretary to be sufficient in itself to bring Modern's employees within the coverage of the Act. The District Court indicated willingness to rely upon this issue and it is therefore necessary to consider the record on this point. It was shown at the trial that during the two-year period covered by the complaints, Modern made separate collections of cardboard and waste paper from certain of its customers who were willing to segregate those items from their general trash. From time to time Modern

collected this material and sold it to the local firm of Frank P. R. Bohager & Sons, Inc., hereinafter referred to as Bohager & Sons. The dollar amounts of sales of cardboard and paper were stipulated and, in the twelve months ending July 31, 1961, the sum of such sales was only about 7/10 of 1% of Modern's total sales for that fiscal year. The sale of these materials for a salvage value was permanently discontinued by Modern in October 1961. No evidence was offered to show what use was made of the salvaged cardboard and paper by Bohager & Sons, and the record contains no proof that any of the use-plaintiffs handled such materials. The purchasing agent for New Haven Board and Carton Company at Illchester, Maryland, testified that his firm had purchased salvaged cardboard from Bohager & Sons after April 1, 1959; that such cardboard would usually be placed by his company in storage and commingled with other salvaged material prior to its use in the manufacture of cartons and folding box board; and that these products are shipped to customers in various states on the eastern seaboard. No evidence was introduced to show the quantities of salvaged cardboard thus purchased from Bohager & Sons and there was no identification of the salvaged cardboard as having been previously acquired from Modern.

(e) *Wages and Hours Stipulated*

It was stipulated by the parties that, during the period covered by the suits, many of Modern's drivers and helpers worked in excess of forty hours per week and there is no challenge to the District Court's finding that, if the use-plaintiffs are within the provisions of the Act, Modern's rates of pay for overtime work did not meet the requirements of the Act. The number of hours worked by each

use-plaintiff during the period was also stipulated for purposes of computing any amounts of overtime, and in these appeals no question is raised regarding computation of the amounts of unpaid compensation claimed as due the use-plaintiffs.

II

WERE THE EMPLOYMENTS OF THE USE-PLAINTIFFS WITHIN THE COVERAGE OF THE ACT?

The question before us is whether, under the circumstances here presented, the use-plaintiffs are "engaged in commerce" or "in the production of goods for commerce" as those terms are defined under the Act.[7]

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[7] The alleged violations arose under the requirements of 29 U.S.C.A. § 207 prior to its amendment by the Fair Labor Standards Amendments of 1961 (75 Stat. 69). The pertinent language, as amended in 1949 (63 Stat. 912), reads as follows:

"§ 207. Maximum hours

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[8] The pertinent definitions are found in 29 U.S.C.A. § 203, as amended in 1949 (63 Stat. 911):

"§ 203. Definitions

"As used in this chapter—

* * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * * *

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

It is uniformly recognized that in enacting the Fair Labor Standards Act of 1938 the Congress did not exercise the full scope of its power to regulate commerce. See, *e.g.*, *Mitchell* v. *H. B. Zachry Co.*, 362 U. S. 310, 314-16 (1960); *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U. S. 207, 211 (1959); *McLeod* v. *Threlkeld*, 319 U. S. 491, 493 (1943); *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522-23 (1942). The rejection of a proposal to adopt language making the Act applicable to employees "engaged in commerce in any industry affecting commerce," instead of the enacted language which applied the regulation of hours and wages to "each of his employees who is engaged in commerce or in the production of goods for commerce" (29 U.S.C.A. §§ 206, 207), indicated a Congressional purpose to leave local business to regulation by the states. See *Mitchell* v. *H. B. Zachry Co.*, supra; *McLeod* v. *Threlkeld*, supra; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570 (1943). In the absence of a provision for administrative determination, the primary responsibility for the application of the Act to particular fact situations has been vested in the courts and, although this process is essentially empirical, certain tests are useful in drawing the lines between the area of activity regulated by the Act and that left to the states for regulation.

The activities of the employee, not those of the employer, are decisive on the question of the Act's coverage and the decision is governed by practical considerations rather than technical conceptions. See, *e.g.*, *Mitchell* v. *H. B. Zachry Co.*, supra; *Mitchell* v. *Lublin, McGaughy & Asso.*, supra; *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427 (1955); *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943); *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943); *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942). In considering the ap-

plication of the law to the facts of record, it is advisable to consider three categories of employees whose activities are deemed to be within the coverage of the Act: (1) Those "engaged in commerce," (2) those "engaged in the production of goods for commerce" in a direct sense, and (3) those "engaged in any closely related process or occupation directly essential to the production of goods for commerce."

(a) *Were They Employed "in Commerce"?*

In determining whether employees are "engaged in commerce" within the applicable provisions of the Act, the test is "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." *Mitchell* v. *Lublin, McGaughy & Asso.*, supra, 358 U. S. at 212; *Mitchell* v. *Vollmer & Co.*, supra, 349 U. S. at 429. As none of Modern's employees either crosses state lines in connection with his employment, handles goods directly moving in the channels of interstate commerce, or directly contributes to the repair or extension of facilities of interstate commerce (see *e.g.*, *Mitchell* v. *Vollmer & Co.*, supra), it is clear that the use-plaintiffs were not "engaged in commerce" within the meaning of the Act.[9] To the contrary, Modern's employees were and are engaged almost exclusively, in the removal of waste which lacks further utility and in the final destruction or disposition thereof. Far from feeding or supporting the interstate flow of

[9] For quite distinguishable facts in cases applying the Act on the basis that employees were "engaged in commerce" see, *e.g.* Mitchell v. Lublin, McGaughy & Asso., supra; Mitchell v. Vollmer & Co., supra; Fitzgerald Co. v. Pedersen, 324 U. S. 720 (1945); Overstreet v. North Shore Corp., 318 U. S. 125 (1943); Walling v. Jacksonville Paper Co., supra.

commerce, these employees deposited the materials handled at an ultimate in-state destination.

(b) *Were They "Engaged in Producing Goods for Commerce"?*

A second category of employee activity held to be within the coverage of the Act is "the production of goods for commerce" in the sense that the employee works directly on or handles goods which flow into interstate commerce either immediately or eventually. With regard to the activities of Modern's employees in removing trash and depositing it for final destruction in the State of Maryland, there is patently no possible application of the Act here on the basis of this category. However, before the trial court and again in this court, the Secretary contended that the sale by Modern of salvaged waste paper and cardboard to Bohager & Sons (the "cardboard issue" noted above) constituted "the production of goods for commerce" within the meaning of the Act. The evidence discussed above shows that the amount of Modern's business represented by these sales was extremely small (at all times probably less than 2% of gross sales) and would be *de minimus*, if that doctrine were applicable in these cases. But the cases have found employees within the coverage of the Act in spite of the relatively small proportion of the employer's business involved. See., *e.g.*, *Roland Electrical Co. v. Walling*, 326 U. S. 657, 661 (1946), where the Act was applied on the basis of a stipulation that 33 of the "larger and most active accounts" out of a total of about 1,000 customers of an electrical contracting and sales business were either in interstate commerce or producing goods for commerce; and *Mabee v. White Plains Publishing Co.*, 327 U. S. 178 (1946), where about ½ of 1% of the circulation of a daily

newspaper regularly went out of state and the Court held that employees of the publisher could be shown to be producing goods for commerce and therefore covered by the Act. While *Mabee v. White Plains Publishing Co.* expressly stated that the *de minimus* maxim cannot be applied relative to the volume of the employer's regular interstate business under 29 U.S.C.A. § 215(a)(1); the Court observed that applicability of the Act to employees is dependent upon the character of their work. In this case we think the Secretary has failed to carry his burden of proof in two respects. First, he failed to show that any of the cardboard or waste paper sold by Modern to Bohager & Sons actually found its way into interstate commerce. No evidence was presented to explain what that purchaser did with salvaged material received from Modern. It is not at all clear that material sold by Modern was *ever* resold to New Haven Board and Carton Company. Certainly, we cannot assume that critical fact. Second, the Secretary failed to show that any of the use-plaintiffs ever collected the salvaged cardboard and waste paper or made delivery thereof to Bohager & Sons. Proof of employment of the use-plaintiffs in the production of goods for commerce was clearly absent.

(c) *Were Their Employments "Closely Related" and "Directly Essential" to the Production of Goods for Commerce?*

Whether the use-plaintiffs in these suits were "engaged in any closely related process or occupation directly essential to the production of goods for commerce" is the principal issue in this case. Relying upon testimony describing inconveniences and possible work stoppages anticipated by six of Modern's customers if trash removal service were not available on a regular basis, the District Court

found that the use-plaintiffs were engaged in work "closely related" and "directly essential" to the production of goods for commerce and held them within the coverage of the Act. Consideration of the facts of record in the light of cases interpreting the language of the Act convinces us that the trial judge erred in this holding and that the coverage of the Act should not be extended to include these employees.

Basic to consideration and determination of this phase of the present case are three decisions in which the Supreme Court applied the language of section 3(j) of the Act[10] prior to its amendment in 1949: *Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942); *Borden Co. v. Borella*, 325 U. S. 679 (1945); and *10 East 40th St. Co. v. Callus*, 325 U. S. 578 (1945). In *Kirschbaum* the meaning of the phrase "necessary to the production [of goods for commerce]" was examined and it was held that coverage under the Act extended to employees of the owner of a loft building who were engaged in operation and maintenance thereof, where the tenants were principally engaged in the production of clothing for shipment in interstate commerce. The Court reasoned that, although the owner was in no way affiliated with the tenants and did not produce goods for commerce, the "work of the employees * * * had such

[10] 29 U.S.C.A. §203(j), as revised in 1949 the section reads as set forth in footnote 8, supra. Only the last clause was amended in 1949. Before the amendment it was provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof*, in any State." 52 Stat. 1061. (Emphasis added.) The amended last clause provides: "*or in any closely related process or occupation directly essential to the production thereof*, in any State." 63 Stat. 911. (Emphasis added.)

a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it * * *" that the employees' occupations were "necessary" to such production. In the *Borden Co.* case a similar conclusion was reached in holding the Act applicable to porters, elevator operators and night watchmen employed in the New York City office building owned by Borden Company, an interstate producer of food products, and largely tenanted by that company's central offices, even though no production facilities were located in the building. The extensive and detailed supervision, management and control of operations maintained by executives and administrators located in the building were found to be just as essential to the productive activity of Borden's scattered operating facilities as the direct physical labor performed in the loft in *Kirschbaum*. Since the employees engaged in maintenance and operation of Borden's office building stood in the same relationship to this "production" as did those in *Kirschbaum*, the Court held their occupations were "necessary" to production for commerce and covered by the Act. In the *Callus* case,* however, a different result was reached, even though the employees of the building performed the same tasks as those involved in the *Kirschbaum* and *Borden Co.* cases. In *Callus* the space in a 48-story New York office building was held out for general tenancy and was leased to over one hundred tenants engaged in a great variety of enterprises. Although a substantial portion of the tenants was shown to be engaged in the production of goods for interstate commerce (at remote locations, as in *Borden Co.*), the Court concluded:

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*Cited and followed by this court in Thompson v. Alester G. Furman Company, 222 F. 2d 421 (4th Cir. 1955).

"Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act." 325 U. S. at 583.

Discussing the line drawn between *Callus* on the one hand and *Kirschbaum* and *Borden Co.* on the other, in a recent opinion, *Mitchell* v. *H. B. Zachry Co.*, 362 U. S. 310, 315 (1960), the Court said:

"* * * Regardful of the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business, we held the case [*Callus*] distinguishable from *Borden* and *Kirschbaum* because the employment, since part of an enterprise which 'spontaneously satisfies the common understanding of what is local business,' was itself sufficiently different, despite identical employee duties, from prior cases to justify regarding it as separate from the 'necessary parts of a commercial process'

> which are within the Act. These decisions and distinctions were not exercises in lexicography. No niceties in phrasing or formula of words could do service for judgment, could dispense with painstaking appraisal of all the variant elements in the different situations presented by successive cases in light of the purpose of Congress to limit coverage short of the exercise by it of its full power under the Commerce Clause."

In 1949 the last clause of section 3(j), now 29 U.S.C.A. § 203(j), was amended by substituting the words "directly essential" for the word "necessary" and by adding the requirement that the employment be "closely related" to production (see footnote 10, supra). Although the legislative history of the amendment indicates some disagreement as to the degree of the change, it is apparent that some restraint on coverage was intended by both the House and the Senate. See discussion in *Mitchell* v. *H. B. Zachry Co.*, 362 U. S. 310, 317 (1960). The Court in the last above cited case pointed out that, at least in the peripheral category of activity which is merely "related" to production for commerce, Congress expressly reemphasized its purpose to avoid intrusion into withdrawn local activities.

As the excerpts from the legislative history quoted in the District Court's opinion (207 F. Supp. at 602-603) demonstrate, both the House and Senate Reports stated that the 1949 changes were not intended to remove maintenance, custodial and clerical employees from the coverage of the Act, since "the work of such employees is, *as a rule*, closely related and directly essential to production whether they are employed by the producer of goods or by some

one else who has undertaken the performance of particular tasks for the producer." (Senate Report, 95 Cong. Rec. 14875; emphasis supplied.) This statement clearly endorses the continuation of coverage for such employees as those in *Kirschbaum* and *Borden Co.*, but it does not say that employees doing such work will be covered in all cases.

With the legislative history and judicial evaluation of the Act and its 1949 amendments before us, we find the Secretary's citation of types of employment activity which fall within or without the coverage of the Act singularly unpersuasive. So far as can be determined, the holdings in *Kirschbaum*, *Borden Co.* and *Callus* reflect existing law based on their respective fact situations. Moreover, in applying the Act to those employed in activities merely "related" to production for commerce, a conservative view has persisted and requires independent consideration of each situation to determine the character of the relationship between the employee's activity and interstate commerce. Thus, merely listing occupations as covered or exempt under the Act can provide little guidance. Porters, for instance, can fall on either side of the line.

Careful examination of the cases convinces us that two factors, among others, which are vital in holding an employee's employment within the coverage of the Act, are the degree of "remoteness" of his activities from production for commerce and the presence or absence of a "dedication" to production for commerce. In short, for coverage to extend to an employee his activity cannot be too remote from production for commerce and it cannot completely lack dedication to production for commerce.

These criteria can best be illustrated by reference to

cases. In *Kirschbaum* and *Borden Co.*, the buildings were "dedicated" to the production of goods for commerce where there was a lasting dominant relationship between the activities for which the building was used and production for commerce. In *Callus*, on the other hand, it was the absence of any such relation to interstate commerce which removed the employment from the coverage of the Act. Any connection with commerce in *Callus* was purely fortuitous and subject to change; hence, the Court refused to consider what percentage of the tenants were producing for commerce. The physical activities of the three groups of employees were similar, as were the contacts with tenants; and in *Borden Co.* and *Callus* the employments were equally "remote" from production for commerce because equally separated from the physical process of production.

In *Mitchell v. H. B. Zachry Co.*, 362 U. S. 310 (1960), the Court held that employment in construction of a dam for the sole purpose of impounding a reservoir to supply Corpus Christi, Texas, and vicinity was not within the coverage of the Act even though water from the system would be supplied to facilities and instrumentalities of commerce and to industries producing goods for commerce. Replacement or new construction was distinguished from maintenance and repair of the dam after completion on the theory that employment in construction was one step more remote than employment in maintenance and repair. In addition, the Court emphasized that neither the construction nor the operation of the dam was designed for the use of producers for commerce, but was intended instead for a miscellany of users throughout the geographical area of the water district. On the basis of the combination of remoteness of construction from production

and the absence of a dedication of the completed facilities either exclusively or primarily to production, the Court found that the activity was not "closely related" or "directly essential" to production for commerce.

The relationship between the employment and production for commerce in the present case is unmistakably similar to that in *Callus*, especially upon consideration of the factors of dedication and remoteness. The outstanding feature of the employment of the use-plaintiffs is a lack of dedication to production for commerce. Modern's trash removal service is held out on the same terms for the use of anyone in the geographical area served. The character and activity of the customer are so immaterial to Modern's operations that Modern's employees are generally uninformed and unconcerned about the customers they serve. The sole problem confronting the drivers is how to remove the trash with dispatch and how frequently to return for more. If any of Modern's customers produces goods for shipment in interstate commerce, the relationship of the employee serving that customer to such production for commerce is purely fortuitous and is subject to change, just as it was in *Callus*. The purpose of Modern's activity is to serve a miscellany of users in a limited geographical area and, as was true of the water supply system in *Mitchell* v. *H. B. Zachry Co.*, there is no dedication to production for commerce.

The trash removal activity revealed by this record "spontaneously satisfies the common understanding of what is local business" and the employees of such an employer are engaged in local business. The generally accepted view of trash removal as a local service, carried on in a limited geographical area for the benefit of all local residents, fully

supports this statement. It would stretch understanding too far to hold that the trash collector is engaged in "producing" all the goods and services offered by his varied customers, even under the broad terms of section 3(j) of the Act (see footnote 8, supra).

Moreover, the trash removal service provided to Modern's customers by the use-plaintiffs is more remote than the work of a porter on the premises of a manufacturing operation or in the offices of executives and administrators. The physical contact of Modern's employees with a customer may be no more than two to three minutes a week and that contact is outside of or at the periphery of the customer's operating area. How different is the "outside" work of a trashman from a porter's intimate and regular contact *inside* the premises! We find here both a remoteness from production for commerce and the absence of a dedication, either exclusively or primarily, to production for commerce which lead us to the conclusion that the activity of the use-plaintiffs is not "closely related" or "directly essential" to production for commerce.

We reach the above conclusion, as did the Court in *Callus*, without consideration of the quantitative evidence regarding the amount of customer activity which is or was in production for commerce or "in commerce." However, as noted above, the Secretary presented direct proof of only four customers which shipped goods in interstate commerce. In all, less than forty of the 800 to 1,000 customers served by Modern during the period represented by the proof were even identified by name in interrogatories and testimony. No evidence in this record indicates that a large proportion of Modern's business was related to production for commerce. The stipulation agreed to by Modern is the sole item

tying the activities of the use-plaintiffs to customers engaged in the production of goods for commerce and it establishes such a contact for no more than a few minutes each week. Especially in this third category where employer activity is only "related" to production for commerce, we think proof of a more substantial contact with and effect on commerce than is here demonstrated is required to bring employees within the coverage of the Act. Congress has most strongly indicated its desire to limit displacement of state power in this area (*Mitchell v. H. B. Zachry Co.*, 32 U. S. 310, 316 (1960)) and, therefore, courts must insist upon adequate proof to justify the extension of coverage.

The Secretary cites *Mitchell v. Dooley Bros., Inc.*, 286 F. 2d 40 (1st Cir. 1960), *cert. denied*, 366 U. S. 919 (1961), as reaching a decision favorable to his view on facts similar to the present case. In that case the Secretary of Labor sought an injunction to restrain Dooley Bros., Inc., a local trash collector in and around Boston, Massachusetts, from violating the Act, where each of six employees spent one fourth to one third of every working day in making collections from customers engaged in production of goods for interstate commerce. The District Court, in its opinion at 181 F. Supp. 312 (D. Mass. 1960), granted the company's motion for summary judgment and the Court of Appeals reversed on the ground that the employment was both "directly essential" and "closely related" to production for commerce. Since the District Court apparently had found the employment "directly essential," the decision of the Court of Appeals discussed only the issue of remoteness and found error in the view of the District Court that the 1949 amendment of section 3(j) of the Act had changed the law to exclude the employees

there involved from coverage. It is noteworthy that the *Callus* decision was not mentioned in either the opinion of the District Court or the Court of Appeals and that there was no discussion of "dedication," the significant factor so recently emphasized by the Supreme Court in *Mitchell v. H. B. Zachry Co.*, supra. With the limited knowledge of the facts available to us, it is impossible to determine whether or not the *Dooley Bros.* opinion is consistent with this one. However, as the different results reached simultaneously in *Borden Co.* and *Callus* so dramatically illustrate, it is a fundamental principle that each of these cases must be considered on its own special facts. Thus, we do not consider the result in *Dooley Bros.* persuasive here.

III

IS MODERN EXEMPT AS A "RETAIL OR SERVICE ESTABLISHMENT"?

Even assuming, *arguendo*, that the activities of the use-plaintiffs bring them within the coverage of the Act, an independent alternative ground for the holding that Modern's employees are not subject to the provisions of the Act is afforded by the exemption under section 13(a)(2) of the Act.[11] The 1949 revision of that section specified

[11] 29 U.S.C.A. § 213(a)(2), as revised by amendment in 1949; provided as follows:

"§ 213. Exemptions

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both)

three tests which must be met by an establishment seeking to qualify for the exemption: (1) Fifty percent of its annual dollar-volume of sales of goods or services must be made within the state; (2) seventy-five percent of its total sales volume must *not* be for resale, (3) seventy-five percent of its total sales volume must be recognized as retail sales or services in the particular industry. It is undisputed that Modern has met the first two of these tests. The question here is whether Modern has carried its burden of proof to satisfy the third.

At the trial Modern introduced the testimony and depositions of three witnesses who were then engaged in the management of unrelated trash removal businesses. Each stated his opinion that the services performed by Modern are retail services and are so regarded by the trash removal industry in general. In support of these views the following characteristics of Modern's business were noted: The service is offered to the entire public; there is no possible resale or re-use of materials collected; the customers are "end users" of the service with no physical possibility for resale of the service; the service is extended in rel-

---

is not for resale and is recognized as retail sales or services in the particular industry; * * *" 63 Stat. 917 (1949).

As the District Court noted, the Fair Labor Standards Amendments of 1961, 75 Stat. 65, 71 (1961), became effective just before suit was brought in these cases. However, because Modern's annual gross volume of sales did not amount to $1,000,000 or more and Modern is not engaged in any of the business activities, both as specified by the recent amendment, the section, as above quoted is applicable to the instant case.

As originally enacted and prior to its amendment in 1949, the above section provided:

"Sec. 13. (a) The provisions of sections 6 [now 206] and 7 [now 207] shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *." 52 Stat. 1067 (1938).

atively small amounts per customer to many customers; and the service satisfies the everyday needs of the general community.

(a) *Does the Trash Removal Industry Lack a "Retail Concept"?*

It is Modern's contention that the requirements of the third test under section 13(a)(2), as amended in 1949, have been fully satisfied by the uncontradicted evidence that all of its waste removal services are considered retail in the trash removal industry. The Secretary, however, contends that before such recognition of a business activity as retail sales or services can be established, it must be shown that within the meaning of the Act there exists a so-called "retail concept" in the industry. Secondly, the Secretary argues that Congress never intended to rely solely upon the declarations of persons engaged in business in an industry to establish recognition of an activity as retail sales or services in that industry, since such testimony would have too great a likelihood of being self-serving.

The Secretary presented, as an expert witness, Dr. Robert D. Entenberg, a professor and author of several books in the field of marketing. Dr. Entenberg stated that, in his opinion, Modern's service did not fall within ordinary concepts of retail or wholesale but most closely resembled a utility, and he noted that it was so classified by the Standard Industrial Classification Manual in 1957. However, Dr. Entenberg also gave the opinion that Modern's service had more of the attributes of wholesale than of retail on the grounds that it served a business function to commercial customers and that Modern's service was sold primarily to business rather than private customers.

Counsel for Modern here contends that this latter opinion was especially misleading to the trial court because it relied on "business use" as the criterion for a nonretail sale, a test which was expressly repudiated by the 1949 amendment of section 13(a)(2), presently to be explained. Modern claims that Dr. Entenberg's criteria for a "retail or service establishment" were plainly at variance with the Wage and Hour Division's administrative regulations. Modern also points out that Dr. Entenberg frankly admitted that he lacked personal familiarity with the trash removal industry and the opinions of that industry.

The District Court held "as a matter of law" that Modern is not a "retail or service establishment" on the basis of (a) Dr. Entenberg's testimony, (b) the classification of "Refuse Systems" as utilities in the Standard Industrial Classification Manual, and (c) the similarity of the work of Modern's employees to that of porters and maintenance men. Alternatively, the court found as a fact that Modern had "failed to prove that its business had traditionally, and before 1949, been commonly recognized as retail," and concluded as a matter of law that it had failed to prove that it is entitled to exemption. Our disagreement with these conclusions is explained in the following discussion.

It is well-established that exemptions from the coverage of the Act are to be narrowly construed against the employers seeking to assert them and that, in order to qualify, establishments must be plainly and unmistakably within the terms and spirit of the exemptions. *Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960); *Mitchell v. Kentucky Finance Co.*, 359 U. S. 290, 295 (1959); *Phillips Co. v. Walling*, 324 U. S. 490, 493 (1945); *Mitchell v.*

Sherry Corinc Corp., 264 F. 2d 831, 835 (4th Cir. 1959), *cert. denied*, 360 U. S. 934.

The Secretary relies upon *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290 (1959), and several cases following it, in urging that Modern cannot qualify for the exemption sought because it has not shown that its activity fits the "concept" of retail contemplated by section 13(a)(2). In *Kentucky Finance* the Court denied the exemption to a small loan company even though it was clear (1) that more than fifty percent of its sales were made within the state, (2) none of its sales were for resale, and (3) the activity was recognized in the financial industry as the "retail end" of that industry. It was noted that the 1949 amendment to section 13(a)(2) was made for the specific and particularized purpose of eliminating the Administrator's "business use" test, previously approved by the Court in *Roland Electrical Co.* v. *Walling*, 326 U. S. 657 (1946), and substituting more flexible tests therefor. But, the Court said, 359 U. S. at 294-95:

> "* * * We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises *otherwise eligible under existing concepts* to achieve exemption even though more than 25 percent of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and were recognized in the field or industry involved as retail. Thus *enterprises in the financial field, none of which had*

previously been considered to qualify for the exemption regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in 'retail financing,' remained unaffected by the amendment of § 13(a)(2).

"Any residual doubt on this score is dispelled by the explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports to the effect that 'The amendment does not exempt banks, insurance companies, building and loan associations, *credit companies* [this emphasis supplied by the Court], newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., *because there is no concept of retail selling or servicing in these industries.* Where it was intended that such businesses have an exemption one was specifically provided by the law . . . ." (Emphasis added except as noted.)

As the above quoted remarks clearly indicate, there are fields which completely lack a retail concept, such as the financial field, and there are business activities which have been specifically mentioned by Congress as being ineligible for exemption as retail or service establishments. But, it is significant that trash removal is not in either of these categories. Even the rulings of the Administrator have not classified the trash removal industry as ineligible for the exemption for lack of a "retail concept." See 29 C.F.R. § 779.317 (rev. as of Jan. 1, 1963). No case except *Mitchell v. Dudley Bros., Inc.*, supra, 286 F. 2d 40 (1st Cir. 1960), has considered application of the Act to employees in the trash removal industry. Since the two opinions written in

that case failed to discuss the possibility of exemption under section 13(a)(2), it may be that such a possibility was not considered in *Dooley Bros.*

In the absence of any prior determination classifying trash removal as within or outside the traditional retail concept, we are urged to consider Modern's activities analogous to those of other types of establishments considered ineligible for exemption in cases and in administrative regulations such as 29 C.F.R. § 779.317. The suggested approach was followed in *Goldberg* v. *Sorzas*, 294 F. 2d 841 (3d Cir. 1961), where the court decided that a "shopping service," whose employees posed as customers and evaluated the efficiency of clerks in retail establishments for the managements thereof, could not be a "retail or service establishment" because its service was similar to that of several types of establishments long considered by the Administrator as ordinarily lacking in retail characteristics and because the service, a specialized one which the public had no occasion to use, had never been recognized as a retail service. The Secretary also contends that Modern's business is closely analogous to that of supplying janitorial services for offices and industrial establishments, a business recently held to be outside the "retail concept" in *Goldberg* v. *Saf-T-Clean, Inc.*, 209 F. Supp. 343 (S.D. Fla. 1962), and *Goldberg* v. *Eagle Maintenance & Supply Co.*, 197 F. Supp. 27 (S.D. Cal. 1961).

We agree that close and persuasive comparisons existed in *Goldberg* v. *Sorzas*, supra, especially where the service offered had utility *only* to businessmen, and we note that the employees there involved, on occasion, crossed state lines to render the service. However, in none of the types of establishments called to our attention do we find such

similar characteristics as would compel us to hold that an establishment offering and performing trash removal services in the manner shown by this record is beyond the "retail concept."

In determining whether or not a business activity is a "retail or service establishment" within the meaning of the section 13(a)(2) exemption, we think the most satisfactory approach is to examine the facts of record as to the nature and conduct of its business in the light of general criteria developed under the Act since its enactment in 1938. Of course, the "business use" rule, that sales to other than individual consumers to satisfy their personal wants could not qualify as retail, can no longer be used for such determinations. Although neither binding on the courts nor equally useful in all cases, the current regulations published by the Secretary provide some guidelines, several of which we find pertinent in making an examination of the present record. See 29 C.F.R. (rev. as of Jan. 1, 1963). The general characteristics of retail and service establishments are described in § 779.318 as follows:

> "Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. * * * Such an establishment sells to the general public its food and drink * * * It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living."

Some of the usual distinctions between wholesale and retail activities are set forth in § 779.327 in these words:

> "(a) The distinction between a retail sale and a wholesale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail."
>
> * * * * *
>
> "(b) The sale of goods or services in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the normal retail price is given, is generally regarded as a wholesale sale in most industries."

Evaluation of the facts of record clearly indicates to us that Modern's business fits the above-mentioned and other important criteria for classification as a retail or service establishment. Its sales are numerous and relatively small amounts of service are rendered at each stop. The service is offered to the general public in a limited geographical area at uniform rates with no discounts of the wholesale type. There is no requirement that customers utilize Modern's service regularly or in any minimum quantity and there is no requirement that the customer have status as a manufacturer, retailer or other commercial entity. The removal and final disposal of waste ministers to the every-

day needs of the customers and is a clear manifestation of the "end of the stream of distribution." Moreover, one can hardly conceive of a field of endeavor where a more local and independent business is likely to spring up or is more typical. Any man with no more than a truck, physical vigor and enterprise can still solicit customers, collect and dispose of trash in many communities. It would indeed be remarkable if his hired helpers were to be brought within the Secretary's complex and confining regulations merely because a portion of the customers served were found to be engaged in production for commerce. Although it is not specified in the legislative history as a typical retail business, we feel that trash removal as carried out by Modern readily qualifies for that classification. Taking a very practical view, which is said to be the proper criterion in these cases, would seem to point to the conclusion that Modern's activity fits the concept of retail contemplated by section 13(a)(2) of the Act.

(b) *Did Modern Prove Recognition of its Activity as Retail in the Industry?*

The Secretary argues that the court cannot rely on statements of persons in business within the industry to show that Modern's activity is recognized as retail in the trash removal industry. However, it is clear that each of the three witnesses offered by Modern was well-qualified to state both his personal opinion and the general opinion of persons in the industry as to what was recognized as a retail service in the industry. In contrast, Dr. Entenberg, the Secretary's only witness on this point, made it abundantly clear that he was not familiar with the trash removal industry, its methods of operation, or the opinions of its practitioners. Although some legislators, in discussing the

1949 amendment to section 13(a)(2), expressed concern that the amendment would permit each industry to decide for itself whether or not its sales were retail,[12] it was pointed out that the only proper background for defining a retail or service establishment in a particular industry is the understanding of the people dealing in that industry as to what constitutes retail services or retail sales.[13] Final determination, of course, was left to the Administrator and to the courts.

In the present case, not only does the testimony of members of the industry support Modern's claim to being a retail or service establishment, but so also do many of the general criteria set forth by the Department of Labor in its administrative regulations. A practical view of the physical facts of record clearly indicates that Modern is engaged in a local business offering services to "ultimate" consumers. Dr. Entenberg's judgment as to whether Modern's service is retail or wholesale, while properly authoritative in his academic field, fails to affect the issue before us because it was based upon the "business use" test[14] which can no

[12] Remarks of Senator Aiken, 95 Cong. Rec. 12510, 12519.

[13] Remarks of Senator Holland, 95 Cong. Rec. 12501, 12510, 12519.

[14] Dr. Entenberg clearly stated that the criterion he was using to determine whether a sale was retail or wholesale was "the purpose for which the service or good is bought determines the classification." He elaborated on this statement, "if the purpose of the sale is for personal consumption and use, it is a retail sale regardless of the quantity involved, and if the service sale or the sale of a good is for the purpose of furthering production for for resale, or to improve the operating efficiency, or it is necessary in the conduct of a business, this is automatically a wholesale sale." We find it interesting to compare these definitions with those of Dr. Theodore N. Beckman, co-author with Maynard and Engle of marketing textbooks which were identified by Dr. Entenberg as stating the accepted definitions of retail and wholesale. Dr. Beckman's

longer be used in considering exemptions under section 13(a)(2).

We, therefore, hold that, even if its employees were held to be within the coverage of the Act, Modern has satisfied its burden of proof in showing it is a "retail or service establishment" entitled to exemption from the provisions of the Act under section 13(a)(2).

IV

ADDITIONAL ISSUES

As we conclude that the use-plaintiffs cannot recover the compensation awards made at the direction of the District Court, we find it unnecessary to decide whether that court erred in failing to allow interest on the awards.

Modern has also contended that the Secretary lacked power to bring the wage suits under 29 U.S.C.A. § 216(c) on the ground that several of the issues of law involved had not been settled by the courts. Although the principles controlling decisions as to coverage and exemptions under the Act are elusive and difficult to apply, this case differs from *Wirtz v. Highway Transportation, Inc.*, 310 F.2d 643 (4th Cir. 1962), in that the legal principles here have been

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definitions were among those quoted in Roland Electrical Co. v. Walling, 326 U.S. 657, 674 (1946), in support of the "business use" test:

"'Wholesaling includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase.

"'Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased.' (Beckman and Engle on Wholesaling Principles and Practice (1937) p. 25)."

established within the meaning of the prohibition against test suits in 29 U.S.C.A. § 216(c), (see footnote 3, supra). Actions commenced by the Secretary to enforce the provisions of the Act cannot be barred on the sole ground that application of the law to the facts is difficult and onerous.

For the reasons stated, we conclude that the injunction was properly denied and that the use-plaintiffs were not entitled to recover. The cases will be remanded with direction to enter appropriate orders consistent with the views herein expressed.

Affirmed in part, reversed in part and remanded with directions.

APPENDIX B

JUDGMENTS

[Captions omitted]

No. 8828

Appeal from *the United States District Court for the* ---------- *District of* ---------- Maryland.

This cause *came on to be heard on the record from the United States District Court for the* ---------- ---------- *District of* ---------- Maryland ---------- ---------- *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed.

HERBERT S. BOREMAN,
United States Circuit Judge.

Filed: September 23 1963.

No. 8829

Cross-appeal from *the United States District Court for the* ---------- *District of* ---------- Maryland.

This cause *came on to be heard on the record from the United States District Court for the* ---------- ---------- *District of* ---------- Maryland ---------- ---------- *and was argued by counsel:*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the*

said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

HERBERT S. BOREMAN,
United States Circuit Judge.

Filed: September 23, 1963.

No. 8830

Cross-appeal from *the United States District Court for the* ---------- *District of* ---------- Maryland.

This cause *came on to be heard on the record from the United States District Court for the* ---------- *District of* ---------- Maryland ---------- *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

HERBERT S. BOREMAN,
United States Circuit Judge.

Filed: September 23, 1963.

APPENDIX C

Order of The Court of Appeals on Petition for Rehearing

[Caption omitted.]

Nos. 8828, 8829 and 8830.

ORDER

Upon consideration, it is ordered that the Petition for Rehearing by the Court en banc, filed by the appellee and cross-appellant, be, and the same is hereby, denied. Due to illness and present incapacity, Chief Judge Simon E. Sobeloff does not join herein.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.
HERBERT S. BOREMAN,
United States Circuit Judge.
ALBERT V. BRYAN,
United States Circuit Judge.
J. SPENCER BELL,
United States Circuit Judge.

DECEMBER 18, 1963.
FILED: December 18, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 947

W. WILLARD WIRTZ,
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

MODERN TRASHMOVAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (J.S. App. 16-37) is reported at 207 F. Supp. 596. The opinion of the Court of Appeals (App. 1a-36a) is reported at 323 F. 2d 451.

JURISDICTION

In his jurisdictional statement, the petitioner fails to consider the following: The Secretary of Labor brought three actions. The first (CA No. 8828, Dist. Ct. No. 13316) was an action for an injunction to restrain alleged violations of the Wage and Hour requirements (J.A. App. 1).

The prayers for relief did not include a petition for declaratory decree (J.A. App. 4). The other two actions (CA Nos. 8829 and 8830; Dist. Ct. Nos. 13420 and 13529), were wage suits brought by the Secretary of Labor under the alleged authority of Section 16(c) to recover alleged unpaid compensation claimed to be due to nineteen employees. The cases were consolidated for purposes of trial only. The District Court *dismissed* the injunction action for want of equity (J.A. App. 37). Although Modern Trashmoval, Inc. entered a notice of a limited appeal (J.A. App. 38); the Secretary of Labor did not enter any appeal from this decree. The Court of Appeals, of course, affirmed the decree of the District Court in this case (CA No. 8828; App. 37a). Respondent denies the right of the Secretary to bring the injunction action before this Court.

The two wage actions (CA Nos. 8829 and 8830) were brought under the authority of 29 U.S.C. Section 216(c) of the Act, which reads in part:

> "When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under Section 6 or Section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: PROVIDED, that this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding introduced or brought by the Secretary if it does involve any issue of law not so finally settled."

One of the pleas filed by the respondent in each of the wage cases reads as follows:

> "There are one or more issues of law involved in this case which have not been finally settled by the courts and the Secretary of Labor therefore has no authority to bring this suit." (J.A. App. 44, 72).

If, as the petitioner insists, the Court of Appeals in the present case is in error, then the petitioner, by virtue of his own strength, will have established that the issues of law involved in the case are not finally settled; and they will not have been finally settled until the Supreme Court has decided them. In such a case, the Secretary is without authority to bring a wage suit. The writ of certiorari should not be granted when the only possible effect of a favorable decision will be to establish the Secretary's lack of authority to bring the suits in the first place.

QUESTIONS PRESENTED

In addition to the two jurisdictional questions raised above, the respondent submits that the petitioner has erroneously assumed facts which are in direct conflict with the findings of fact of the Court of Appeals. In particular, the respondent denies the petitioner's assumptions of fact in question "1" tendered by him (Pet. 2) in which petitioner assumes that it has been proved that the nineteen employees for whom wage suits were brought were "engaged regularly and recurrently in the collection and removal of industrial waste, rubbish and debris from establishments engaged in interstate commerce or in the production of goods for interstate commerce . . ." The actual state of the proof will be discussed below.

The respondent therefore states that the questions presented are:

1. May the petitioner bring up for consideration by this Court the action of the District Court in the injunction suit (CA No. 8828)?
2. Did the Secretary of Labor have the authority to bring the two wage suits (CA Nos. 8829 and 8830)?

3. Did the petitioner prove that the nineteen employees who were use-plaintiffs in the wage suits were engaged "regularly and recurrently" in the collection of rubbish "from establishments engaged in interstate commerce or in the production of goods for commerce"?

4. Where the proof regarding the nineteen employees is limited to a stipulation that each of them worked a minimum of two or three minutes per week in collecting trash from an unidentified customer of Modern who was engaged in the production of goods for commerce, are such employees covered by the Act?

5. Is the business of removing waste, rubbish and debris from industrial or commercial establishments a "retail or service establishment" eligible to claim exemption under Section 13(a)(2) of the Act?

THE STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are correctly set forth in the petition, except that the petition omits the quotation of the statute authorizing the Secretary to bring wage suits, the relevant portion of which reads as follows:

> "... When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under Section 6 or Section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: PROVIDED, that this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding

introduced or brought by the Secretary if it does involve any issue of law not so finally settled. . . ." (29 U.S.C. Section 216(c)).

STATEMENT

The petitioner's statement suggests that the Government has proved that the nineteen truck drivers and helpers for whom the Secretary brought wage suits were "regularly and recurrently" engaged in removing rubbish from establishments engaged in interstate commerce. This is very far indeed from the facts as found by the Court of Appeals (see opinion, App. 7a-8a). In substance, the Court of Appeals found that the Government's proof was limited to the following:

(1) That Modern had 800 to 1,000 customers, of whom four were engaged in interstate commerce.

(2) That no identification was made of particular use-plaintiffs as the employees serving these customers and no proof was presented that these customers or their shipments in interstate commerce were representative of Modern's customers as a whole.

(3) That the only other proof was a stipulation to the effect "that during the period in suit and his employment, each use-plaintiff worked a minimum of two or three minutes per week in collecting trash from an unidentified customer who was engaged in the production of goods for commerce" (CA Opinion, App. 8a).

Apparently recognizing this deficiency in proof, the petitioner attempts to rely upon a list of thirty-one customers which the Secretary furnished in advance of trial in response to an interrogatory (see Pet. 6). Petitioner offered proof regarding the production of goods for commerce with regard to only four customers as above stated.

Petitioner offered no proof whatsoever regarding twenty-five of these concerns. We are unable to understand the basis for the petitioner's reference to these unproved allegations of the Secretary; and we deny the petitioner's right to assume that these customers were producing goods for commerce at the locations served by Modern.*

In view of the Court's express findings which are inconsistent with the petitioner's assumptions, the respondent has included its question "3" which will require the petitioner to demonstrate how the Court of Appeals erred in its findings of fact as stated in its opinion (App. 7a-8a).

Contending as we do that the Court of Appeals did not err, question "4" tendered by respondent presents the issue on this subject upon the facts as the Court found them.

ARGUMENT

The Court Does Not Have Jurisdiction

The injunction action (CA No. 8828) was dismissed for want of equity by the District Court. The Secretary did not appeal. The Court of Appeals affirmed. Therefore, this case is not before the Court and the Secretary must base his right to a request for a writ upon the other two suits, which are wage suits. This is, in any event, proper because the Secretary only offered proof with regard to the wage suits and abandoned any attempt to go beyond the allegations of those suits.

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* We should add that the Secretary's answers to interrogatories as to what he would prove were in no sense an indication that the proof existed. He listed fifty employees whom he asserted were covered by the Act (J.A. App. 12-15). He offered no evidence whatsoever to support his allegations with regard to thirty-one of those listed; and abandoned his contentions regarding them in presenting his own case.

The Secretary's right to bring a wage suit is expressly limited to cases which do not involve unsettled issues of law. It was expressly the Congressional intent that the Secretary should not bring wage suits as test suits. Yet, if petitioner's allegations are to be accepted as true (particularly the allegations on page 19, part of which are quoted below), the purpose of the application for certiorari is to settle questions of law important to the entire industry which are at present undetermined. It is hard to understand how the petitioner, in the face of the adverse decision of the Court of Appeals, can attempt to overthrow that decision and at the same time allege that the law is settled. If it is settled, it is settled as the Court of Appeals decided. If that court were to be reversed, then until the reversal, the law will have been unsettled. If the law on any issue involved was unsettled, the Secretary had no right to sue. It would appear that the harder Mr. Solicitor struggles to avoid Charybdis the more firmly does he fall into the embrace of Scylla. It is submitted that this Court should not be interested in undertaking to pilot him out of his predicament.

Petitioner's Question No. 1

At the close of his petition, petitioner attempts to impress upon the Court the importance of the questions which he wishes to present. He says:

> "Directly and immediately the issues [in this case] will determine the applicability of the Act to some 34,500 workers employed as operators and laborers for refuse removal and sanitation companies throughout the nation. . . ." (Pet. 19).

The implication is that if the Court decides in petitioner's favor in the present case, all of these employees will be brought within the coverage of the Act.

Such an argument appears to disregard the fundamental requirements of the Act. The Court is without any doubt interested in determining whether an employer is engaged in commerce or the production of goods for commerce. But its decision in this regard is merely as an adjunct to a determination of whether *the employee* is engaged in commerce or in the production of goods for commerce. The authorities seem to be unanimous that it is ultimately the activities of each employee, and his relationship to commerce or the production of goods for commerce, which will determine whether or not the Act is to apply (see CA Op. App. 11a).* In the present case, the test of coverage is whether the employees of Modern were engaged in the production of goods for commerce—

> "or in any closely related process or occupation directly essential to the production thereof . . ." (29 U.S.C. Sec. 203).

It is, of course, clear that the employees of Modern were not directly engaged in the production of goods for commerce (CA Op. App. 13a). It would appear, therefore, that in any action brought by the Secretary the primary proof would be to show that Modern was dedicated to the removal of trash for persons engaged in the production of goods for commerce; and that the activities of each employee alleged to be covered were closely related and directly essential to the production of such goods. Question

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* In this connection it is notable that as late as 1961 Congress did see fit to enact legislation (effective September 3, 1961) which extends coverage to *all employees* of certain employers, whether or not the individual employees are themselves engaged in commerce or the production of goods for commerce (P.L. 87-30, 75 Stat. 65). But this legislation was confined to the larger employers, with (among other requirements) gross sales of over $1,000,000.00 (29 U.S.C. Sec. 203(r)). The legislation is not applicable here, and is merely mentioned because it indicates that in so far as the smaller employers are concerned, the older test is still in force.

"1" tendered by the petitioner indicates that the petitioner has submitted serious proof along these lines.

As the Court of Appeals points out, he did not (CA Op. App. 7a-8a). The proof in the present case fails to establish any particular interest, or dedication of Modern to removal of trash for persons engaged in commerce; and fails to prove anything beyond a very minimum connection between the employees of Modern and customers engaged in the production of goods for commerce. The Government's real objective, as stated in the last page of its petition, is apparently not to demonstrate that the employees in the present suit were covered; but that the whole industry is covered. And, indeed, if it were to be successful in the present case, the effect would in substance be to relieve th Government of all proof of any real relationship between Modern or its employees, and the production of goods for commerce. If, indeed, the Secretary is seeking to extend the Act to this extent, he would have been more frank by tendering his question "1" in the form in which the respondent has stated its question "4".

Furthermore, if the Court of Appeals is right in its summarization of the proof in the case, there is at present no conflict between the Circuits. The petitioner points to the decision of *Mitchell v. Dooley Brothers, Inc.*, 286 F. 2d 40*, as a decision which conflicts with the decision of the Court of Appeals in the present case. It is true that the reasoning of the Court of Appeals in the present opinion appears skeptical of the Dooley decision, but the facts of the two cases are so readily distinguishable that it is quickly apparent that the two cases do not conflict in the results reached. There it was conceded by the employer that the employees involved spent one-fourth to one-third of their time in making collections from customers engaged in the production of goods for commerce. Here the

*Cert. denied 366 U.S. 911.

proof is confined to a stipulation that a scintilla of time was used by each of the nineteen employees on such customers. The Court of Appeals points this out in its opinion (App. 23a).

While respondent, of course, relies upon *10 East 40th Street Co. v. Callus*, 325 U.S. 578, as a direct authority for its position, it is unnecessary to discuss that case at this time. The Dooley opinion may be in conflict with Callus, though the case was not mentioned in the opinion (CA Op. App. 24a). But the decision of the Court of Appeals in the present case is in conformity with *Callus*.

It may be that it is of great public importance, as the petitioner contends, that the industry receive an answer to question "1", as presented by him. But the answer of the Court in the present case, if in the Secretary's favor, would bring under the coverage of the Act far more than the question indicates because of the limited proof; and, if in the respondent's favor, would be of no use whatsoever in determining the law in cases where a substantial relationship between the employees of the trash removal company and customers engaged in the production of goods, can be proved.

For this reason, it would appear that, if the answer to question "1" posed by the petitioner is important, the Court should wait until that question is brought up in a record which truly reflects the assumptions of fact in the question.

The Exemption Issue

Petitioner's question "2" (restated as respondent's question "5"), relates to the holding that the respondent is an exemption establishment under the provisions of 29 U.S.C. Section 213(a)(2). Petitioner states that a decision on this point is of public importance. But in order to reach this question, the Court must decide all of the preceding

questions tendered by respondent (questions "1" through "4") in petitioner's favor. If the record does not properly present a true test case for petitioner's question "1" (as we contend), then more harm than good can be done if the Court attempts to decide the question merely in order to reach petitioner's question "2".

This is particularly true because of the fact that there is no conflict at all between the Circuits with regard to the right of a trash removal company to an exemption. As pointed out by the Court of Appeals, the Court in the Dooley case apparently did not even consider the matter (CA Op. 29a-30a). Therefore, the only Circuit which has given any direct consideration to this problem in so far as it applies to a trash removal company is the Court of Appeals below, and no conflict has yet been demonstrated. To the contrary, that Court has found that its decision conforms to the standards prescribed by the regulations of the Secretary himself, as of the January 1963 revision (CA Op. App. 31a).

CONCLUSION

If, indeed, the Government believes that the questions stated by it are of national importance, it does not presently have a record which will clearly present those questions.

Petitioner's question "1" will not have a ready answer. The suggestion that a trashman who removes waste from the backyard of — say, a clock manufacturer, is engaged in the production of clocks, would startle the ordinary student of the English language; and no doubt would be resented by a workman skilled in the production of clocks. Such is the proposition which petitioner requests the Court to consider by its tendered question "1". But petitioner is "just making it hard" when he presents a record

which merely shows that each such trashman only used three minutes a week in this "craftsman's" part of his otherwise humdrum work.

In the face of the jurisdictional obstacles; the unsatisfactory record; the absence of any conflict among the Circuits; and basic uncertainty in the petition itself, as to the questions involved; this Court should deny the writ.

Respectfully submitted,

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Solicitor for Respondent.

WHITE, PAGE & LENTZ,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 947

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MODERN TRASHMOVAL, INC., RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This reply memorandum is addressed solely to respondent's assertion that this Court lacks jurisdiction to review these three cases because (1) the Secretary of Labor did not appeal the district court's denial of injunctive relief and (2) the Secretary is without authority to bring the wage suits because the issues of law have not been "finally settled" by the courts within the meaning of the proviso to § 16(c) of the Act, as amended, 29 U.S.C. 216(c) (Br. in Opp. 2).

1. Although the district court, in the exercise of its discretion, denied the government injunctive relief, it nonetheless made an adjudication, in that suit as in the

companion wage cases, that respondent's employees were subject to the provisions of the Act (Pet. 4a). Respondent appealed that ruling, seeking and obtaining a reversal of the decision in the injunction suit to the extent that it held respondent's employees to be covered by the Act (Resp. Br. in court of appeals, pp. 2, 86). Respondent now maintains that the Secretary, having filed no cross-appeal from the denial of the injunction, is barred from seeking a writ of certiorari in the injunction action to have the district court's decision reinstated. That contention, however, ignores the plain language of 28 U.S.C. 1254(1), which authorizes "any party" to a case in the court of appeals to apply for a writ of certiorari.[1] The Secretary was clearly "a party" to respondent's appeal. See *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 544–545, where this Court held that it had jurisdiction to review a petition for certiorari by the United States in a criminal case where only the defendant had appealed and the court of appeals reversed and remanded for a new trial.

2. Respondent also contends that this Court lacks jurisdiction over the two back wage suits because the issues of law have "not been finally settled by the courts" within the meaning of § 16(c) (Br. in Opp.

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[1] The pertinent provision of 28 U.S.C. 1254 reads as follows:

"§ 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

2). Both the court of appeals and the district court rejected that contention.

It is plain that *Mitchell* v. *Dooley Bros.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911, settled the law with sufficient finality to authorize the bringing of these suits for the recovery of back wages. The trial court noted with approval that "The Secretary, quite understandably, heavily relies upon *Mitchell* v. *Dooley Bros., Inc.* * * * as a Court of Appeals decision establishing the right to sue on behalf of defendant's employees" (J.A. 20). And while the court of appeals did not regard *Dooley Bros.* as dispositive (Pet. 24a), it nonetheless held that "the legal principles here have been established within the meaning of the prohibition against test suits in 29 U.S.C.A. § 216(c) * * *. Actions commenced by the Secretary to enforce the provisions of the Act cannot be barred on the sole ground that application of the law to the facts is difficult and onerous." (Pet. 35a–36a.) If the law is now unsettled, it is unsettled only by virtue of the decision of the court of appeals below.

Moreover, it is plain from the legislative history of § 16(c) that this is not the type of action which Congress intended to forbid. The proviso to that section was inserted by the conference managers on the 1949 Amendments, who explained that its purpose was to prevent the Secretary from using his authority under § 16(c) "to bring test cases involving new or novel questions of law" and that it was "not intended, however, to preclude [him] from instituting suits or the court from taking jurisdiction on the basis of existing legal precedents * * *." See

Statement of the Managers on the Part of the House, 95 Cong. Rec. 14934. Similar language appears in the Report of the Majority of Senate Conferees. 95 Cong. Rec. 14874, 14879. Cf. *Mitchell* v. *Independent Ice & Cold Storage Co.*, 294 F. 2d 186, 189 (C.A. 5) certiorari denied, 368 U.S. 952. Plainly, these cases were not instituted as a "test case," but were brought as enforcement actions to collect unpaid back wages.

Respectfully submitted.

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